In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, APPELLANT

v.

MILAN VUITCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum opinion of the United States District Court for the District of Columbia (Appendix A, *infra*, pp. 9–15) is not yet reported.

JURISDICTION

On November 10, 1969, the United States District Court for the District of Columbia entered an order granting a pre-trial motion to dismiss the indictment (Appendix B, *infra*, pp. 17–18), on the ground that a portion of the statute upon which the indictment was founded (22 D.C. Code 201) was unconstitutionally vague. A notice of appeal was filed in the district court on December 10, 1969. The jurisdiction of this

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Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from the decision of a district court dismissing an indictment based upon the invalidity of the statute upon which the indictment is founded. See, *e.g.*, *United States* v. *Petrillo*, 332 U.S. 1.

QUESTION PRESENTED

Whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face.

STATUTE INVOLVED

22 D.C. Code 201 provides in pertinent part:

> Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years: * * *

STATEMENT

Separate and unrelated indictments in the District of Columbia were returned charging appellee, a licensed physician, and Shirley Boyd, a nurse's aide, with violations of the District of Columbia abortion law, 22 D.C. Code 201, *supra*.[1] Each defendant made

[1] The indictment against appellee was in two counts. The first charged him with procuring or producing an abortion on one Inez Fradin on or about February 1, 1968; the second with attempting to procure or produce the same abortion.

a pretrial motion to dismiss, and the district court consolidated the cases. After receiving briefs and hearing argument, the court dismissed the indictment against appellee but denied the motion to dismiss as to Miss Boyd.[2]

Noting the statutory phrase "necessary for the preservation of the mother's life or health," and that the word "health" was nowhere defined in the statute, the district court was of the view that the word was "so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (Appendix, *infra,* p. 11). The court further found that the dilemma of the licensed practitioner was increased by the interpretation given the statute by the Court of Appeals for the District of Columbia in earlier decisions holding that, once the government proves that an abortion has been performed by a physician, the burden shifts to the physician to justify his acts. In other words, the district court concluded, "[the physician] is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health * * *. The jury's acceptance or nonacceptance of an individ-

[2] The district court refused to dismiss the indictment as to non-physician Boyd on the ground that there was "ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians" and, accordingly, that "it was and still is well within the police power of the Congress to outlaw abortions that are not performed * * * [by] a qualified, licensed practitioner of medicine" (Appendix, *infra*, p. 11).

ual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court."[3] (Appendix, *infra*, p. 12.)

THE QUESTION IS SUBSTANTIAL

The consequence of the district court's ruling is that any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it, for any reason whatsoever. The unconditional availability of abortions, unrelated to medical justification, is contrary to the manifest intent of Congress in enacting the instant statute and is at odds with the abortion laws of many States.[4] As the court below recognized, in these circumstances review of the decision by this Court is a matter of importance.

Although our principal contention, pp. 6–8, *infra*, is that the constitutional infirmity found by the district court may be avoided by a legitimate construction of

[3] The court further noted that "[o]ther uncertainties" in this phraseology were "discussed and documented" in *People* v. *Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194 (Cal. 1969), petition for a writ of certiorari pending, No. 971, this Term. In *Belous* a divided court held that the statutory exception to the reach of its then applicable abortion provision (Section 274 Cal. Penal Code)—*i.e.*, "unless the same is necessary to preserve [the woman's] life"—was unconstitutionally vague. The statutory provision involved in *Belous* makes no reference to "health".

[4] See American Law Institute, Model Penal Code, *Tent. Draft No. 9* (1959), p. 146.

the statute, we note at the outset that the district court departed from sound judicial practice by undertaking to pass on the validity of the statute on its face, divorced from "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States* v. *Automobile Workers,* 352 U.S. 567, 591. A statute should not be held vague "on its face" where there exists a substantial class of situations to which the statute may validly be applied without raising constitutional issues. See *United States* v. *National Dairy Corporation,* 372 U.S. 29, 36; *United States* v. *Raines,* 362 U.S. 17, 21; *United States* v. *Petrillo,* 332 U.S. 1, 7.

Since the district court held the statute unconstitutional without establishing any of the facts of the offense charged here, it cannot be known whether the present case in fact raises any of the constitutional doubts expressed by the district court, which relate essentially to situations in which a physician purports to exercise medical judgment whether the operation should be performed. The district court was concerned with whether the statute provided a doctor with guidelines as to his exercise of that judgment and whether a jury should be allowed to pass upon the validity of his exercise of medical judgment.[5] It is evident, however, that there may be many cases in

[5] While the court referred to a possible constitutionally protected right of the woman to decide whether to bear a child, it concluded that the state had an interest in preventing an abortion by an unlicensed physician. We think it is evident that the state equally has an interest in requiring a physician to act in his capacity as such, *i.e.*, to make a medical judgment.

which no such question is presented because the defendant, although a doctor, does not exercise medical judgment.[6] If a physician performs an abortion on a woman whom he has never before seen and whom he has not examined beyond establishing the fact of pregnancy, he clearly would not be exercising medical judgment.[7] Where the government's proof is of this character, the question whether a doctor did or did not exercise medical judgment clearly presents no problem beyond the competence of jurors to determine. Since the statute may be applied, without ambiguity, to doctors who do not exercise medical judgment at all, the district judge should not have invalidated the statute on its face because in his view there might be constitutional problems in cases where the evidence shows an exercise of judgment which the government sought to challenge. Before undertaking to invalidate the statute completely, the court below should at least have sought clarification (by way of a bill of particulars or stipulation of facts)[8] as to whether the government intended to prove that the physician failed to exercise medical judgment.

Even in the situation to which the decision below is addressed—where an abortion is performed in the exercise of a doctor's professional judgment that it is medically justified—we think the court erred in hold-

[6] The very absence of decisions noted by the district court suggests that the question of medical judgment has not been presented by the cases tried.

[7] Leaving aside, of course, the case of a specialist who performs an abortion upon the representation of the patient's doctor that the operation is therapeutically justified.

[8] See *United States* v. *Halseth*, 342 U.S. 277.

ing the statute invalid on its face. The statute need not be construed to require a doctor who exercised medical judgment to establish to the satisfaction of the jury that his judgment was correct and that the abortion was in fact necessary "for the preservation of the mother's life or health." The criminal statute may fairly be construed as being inapplicable to a physician who concludes in good faith in the necessity of an abortion to preserve the mother's life or health. This construction is strongly supported in language contained in *Williams* v. *United States,* 138 F. 2d 81, 84 (C.A.D.C.), one of the cases relied upon below. It would also be consistent with the construction placed by this Court on comparable provisions of prior narcotics laws allowing a physician to dispense narcotics to addict-patients "in the course of his professional practice"; this Court held that a charge of violating the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict. *Linder* v. *United States,* 268 U.S. 5, 14–22; *United States* v. *Boyd,* 271 U.S. 104, 106–107. The same type of issue would often be presented under the abortion statute.

Moreover, while the word "health" admittedly does not lend itself to precise definition, that is not the critical determinant. All that is required is that the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo,* 332 U.S. 1, 8; *United States* v. *National Dairy Corp.,* 372 U.S. 29, 32, and cases there cited. In

our view, the exception from the criminal penalties in the abortion statute is no more unclear than expert medical judgments regarding illness and health required in a variety of other related contexts: the area of mental responsibility for crime, for example. Cf. *Powell* v. *Texas*, 392 U.S. 514, 536–537. And even as to the class of cases to which, in our view, the reasoning of the district court might apply, the clarification of a factual setting would be helpful.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

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FEBRUARY 1970.

APPENDIX A

In the United States District Court for the District of Columbia

Criminal Nos. 1043–68, 1044–68

United States of America

v.

Milan Vuitch

Criminal No. 1587–69

United States of America

v.

Shirley A. Boyd

Memorandum Opinion

These cases involve motions to dismiss indictments for abortion brought under Title 22, Sec. 201, of the D.C. Code. Vuitch is a physician licensed in the District of Columbia; Boyd is a nurse's aide. There is no relation between the two except that each defendant has moved to dismiss the indictment on the ground that the District of Columbia abortion statute is unconstitutional. The elaborate briefs, replete with authorities and background materials, have been considered, including the brief amicus of the American Civil Liberties Union. The arguments having been completed today, the Court is prepared to rule from the bench because of the public urgency of the matter.

While there have been many prosecutions under this statute over the years, there are very few deci-

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sions interpreting it and none of recent vintage. Apart from the wording of the statute itself there is no significant legislative history giving any indication of the underlying congressional intent, either at the time of enactment or subsequent amendment. As far as can be ascertained, this is the first constitutional challenge of the statute and the issues presented in these motions have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs but they are of such common understanding that they need not be elaborated on here in any detail.

The statute in question was originally enacted as part of the District of Columbia Code of 1901 and thereafter re-enacted with only slight modification. It provides in pertinent part:

> "Whoever . . . produces an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . ."

A felony penalty of from one to ten years is provided.

Basically the motions attack the statute for *vagueness,* allege that its practical operation denies equal protection to certain economic and other groups subject to its sanctions and assert a constitutional right of all women, regardless of their circumstances, to determine whether or not they shall bear a child. Constitutional doctrines of recent evolution are referred to by analogy to reinforce the motions.

The statute does not prohibit all abortions. An abortion is permitted where done "as necessary for the preservation of the mother's life and health" *and* "under the direction of a competent licensed

practitioner of medicine." This two partite exception clearly points up a basic congressional concern with what may broadly be said to be medical factors. The Court has a duty to interpret the statute in a manner consistent with the apparent congressional intent. As the briefs and arguments have emphasized, there are still many health or medical problems created by the varying conditions under which abortions are performed. While there have been many advances in medical knowledge and techniques since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction. Indeed there is ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians.

Under these circumstances, it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a "competent", that is, a qualified, licensed practitioner of medicine.

The true crux of the controversy here concerns the other part of the exception—"as necessary for the preservation of the mother's life or health." It is suggested that these words are not precise, that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities, and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law

generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham* v. *United States,* 96 U.S. App. D.C. 312 (1955), *cert. denied,* 350 U.S. 912, and *Williams* v. *United States,* 78 U.S. App. D.C. 147 (1943), that upon the Government establishing that a physician committed an abortion the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary,* 395 U.S. 6 (1969), and *Gainey,* 380 U.S. 63 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" are discussed and documented in *People* v. *Belous,* 80 Cal. Rep. 354 (1969), and need not be repeated here.

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal statute. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.

At common law abortion prior to quickening was not an offense. In fact, abortion did not become a statutory crime in the United States until about 1830. It has repeatedly been held, even under the D.C. statute, that the woman who aborts commits no offense. *Thompson v. United States,* 30 U.S. App. D.C. 352 (1908). There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. *Griswold,* 381 U.S. 479 (1965), *Loving,* 388 U.S. 1 (1967). Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights. The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical. (*See Abortion,* Tietze & Lewit, *Scientific American,* January, 1969, Vol. 220, No. 1). But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia beyond an expression of a clear necessity of placing the matter in the hands of competent doctors.

The question is next presented whether the statute is severable, that is, whether it may be read as outlawing abortions except when performed under the

direction of a competent physician, eliminating only the preservation-of-life-or-health standard. Boyd, a non-physician, urges that because of the vagueness of the life-and-health phrase, the entire statute must fall. The Court concludes otherwise. The statute still protects a proper legislative and separate legislative objective if the one factor is stricken and the other allowed to remain. The Court is satisfied that the statute is severable (*United States* v. *Jackson*, 390 U.S. 570 (1968), *Stewart* v. *Washington*, 301 F. Supp. 610 (1969), and holds that Congress has constitutionally required that abortions be undertaken only under the direction of a competent physician. Title 2–102, 130 governing licensing of the healing arts is not sufficient to protect the congressional purpose of limiting abortions to competent physicians. Even if the Court accepts Boyd's claim to standing under liberal criteria of such cases as *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Flast* v. *Cohen*, 392 U.S. 83 (1968), her challenge fails because the statute is severable.

Boyd's further contention that the statute discriminates against the poor and in its present operation denies medical help in city hospitals but is more liberally applied in some private hospitals has considerable support in the sketchy statistics and other data presented. The statute has received differing interpretations in the hospitals. In the light of the Court's ruling, however, there is no reason why the statute cannot henceforth be evenly applied throughout the city in a way which removes the principal basis for existing uncertainty and confusion. National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of

the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately. Other contentions advanced by Boyd are without merit in view of the rulings made.

The Court cannot legislate. A far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation. The asserted constitutional right of privacy, here the unqualified right to refuse to bear childen, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented. The Court ventures the suggestion that Congess should re-examine the statute promptly in the light of current conditions.

The motion of Dr. Milan Vuitch in both cases is granted as to him only. The motion of Shirley A. Boyd is denied. These remarks shall constitute the Court's opinion when transcribed. A prompt appeal to the United States Supreme Court under 18 U.S.C. § 3731 is highly desirable.

Counsel shall submit an appropriate order promptly.

GERHARD A. GESELL,
United States District Judge.

NOVEMBER 10, 1969.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

(Filed November 10, 1969, Robert M. Stearns, Clerk—
Criminal No. 1043–68)

THE UNITED STATES OF AMERICA

v.

MILAN VUITCH

ORDER

Upon consideration of the opinion of the Court on the Motion To Dismiss the Indictment herein against defendant, Milan Vuitch, it is by the Court this 10th day of November 1969.

Ordered, that the said Motion To Dismiss the Indictment against defendant, Milan Vuitch, be and the same is hereby granted and the indictment herein is dismissed.

GERHARD A. GESELL,
Judge.

Seen:

WM. H. COLLINS, JR.,
Assistant U.S. Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

(Filed November 10, 1969, Robert M. Stearns, Clerk—Criminal No. 1044–68)

THE UNITED STATES OF AMERICA

v.

MILAN VUITCH

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GERHARD A. GESELL,
Judge.

Seen:

WM. H. COLLINS, Jr.,
Assistant U.S. Attorney.

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